No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF FOR AMICI CURIAE 1000 FRIENDS OF OREGON, OREGON CHAPTER OF AMERICAN PLANNING ASSOCIATION, AMERICAN PLANNING ASSOCIATION, AND NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF RESPONDENT

EDWARD J. SULLIVAN
PRESTON, THORGRIMSON,
SHIDLER, GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone (503) 228-3200

H. BISSELL CAREY, III
Counsel of Record
DWIGHT H. MERRIAM
R. JEFFREY LYMAN
ROBINSON & COLE
One Commercial Plaza
280 Trumbull Street
Hartford, Connecticut
06103
Telephone (203) 275-8200

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE

Amici 1000 Friends of Oregon, Oregon Chapter of the American Planning Association, American Planning Association, and National Trust for Historic Preservation file this brief pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters have been filed with the Clerk of the Court.

1000 Friends of Oregon (1000 Friends) is a nonprofit membership organization founded in 1975 by departing Governor Thomas McCall in order to oversee implementation of Oregon's reformed land-use planning and regulatory program. 1000 Friends is committed to a balanced approach to land-use issues and its Advisory Board includes development and business interests as well as conservation and environmental advocates. In order to advance the goals of Oregon's land-use system, 1000 Friends has long been active in appealing local decisions for administrative and judicial review, testifying before the state legislature, and preparing studies and background papers on technical issues related to land-use planning. 1000 Friends has a well-defined and widely-recognized interest in the correct interpretation, implementation, and enforcement of Oregon's land-use program.

Oregon Chapter of American Planning Association (Oregon Chapter), a State Chapter of Amicus American Planning Association, is a broad-based professional organization of approximately 500 members including urban and rural, professional and citizen planners. The primary aims of the Oregon Chapter include promoting sound planning and educating decision-makers and the general public about development policy and legislation. The Oregon Chapter recently received a National Planning Award for its innovative work on decreasing reliance on

the single-occupant vehicle. The Oregon Chapter continues to work actively to promote citizen participation in planning and the legislative process.

American Planning Association (APA) is a non-profit association of 28,000 members who are employed in or otherwise involved with land-use planning and related disciplines. APA members serve the land-use field on behalf of both governmental bodies exercising regulatory authority over real property and property holders subject to land-use regulation. Consequently, APA does not seek either to increase the constitutionally permissible scope of governmental regulation or to promote the interests, constitutional or otherwise, of individual property holders. Rather, APA is fundamentally and vitally interested in promoting rational, predictable, effective and beneficial land use consistent with the needs of individuals having recognized interests in real property and of the public at large. APA members are the professionals, elected and appointed officials, and citizens who engage in land-use planning to accomplish that fundamental goal.

National Trust for Historic Preservation in the United States (National Trust) is a private charitable and educational organization chartered by Congress in 1949 to further the historic preservation policy of the United States and to "facilitiate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468. Congress intended that the National Trust "will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), reprinted in 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual, and 6,600 organizational, members nationwide. Through its Legal Defense

Fund, the National Trust advocates to secure judicial decisions that uphold the continued validity and effectiveness of regulatory protections for historic properties and land-use regulation in general. The National Trust has participated in nearly 80 federal and state court cases for nearly a quarter century, including eight regulatory takings cases heard in this Court.

STATEMENT OF THE CASE

Amici curiae 1000 Friends of Oregon, Oregon Chapter of American Planning Association, American Planning Association, and National Trust for Historic Preservation adopt Respondent City of Tigard's statement of the case.

ARGUMENT

Tigard's permit conditions are an integral part of Oregon's land-use regulatory process that tailors local comprehensive plans to address and mitigate the impacts of specific development proposals. Consequently, they satisfy this Court's traditional rationality review which gives due deference to the judgments of legislatures and administrators. This deferential approach remains appropriate, notwithstanding dicta appearing in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Petitioner's efforts to invoke these dicta from *Nollan* should be rejected, since she never properly challenged the application of Tigard's exactions to her development and since those dicta run contrary to the whole of this Court's jurisprudence and precedents. Amici respectfully request that this Court affirm the decision of the Oregon Supreme Court.

I. TIGARD'S PERMIT CONDITIONS ARE NOT BASED ON AD HOC DECISIONS, BUT RATHER ARISE FROM OREGON'S WELL-CONSIDERED LAND-USE PLANNING SYSTEM; PETITIONER'S CLAIM FAILS TO ADDRESS THE FACTUAL AND LEGAL BASIS FOR TIGARD'S CONDITIONS.

Notwithstanding Petitioner's contrary assertions, this case arises in the context of Oregon's land-use planning program, well established by statutes, administrative rules, case law, and practice. Given this background, Tigard's permit conditions are simply not ad hoc, nor are they founded merely on ipse dixit, as Petitioner suggests. Rather, Tigard's permit conditions facilitate local assessment of infrastructure needs based on a permit process that focuses on expected impacts of proposed development.

A. Tigard's Permit Conditions Arise from Oregon's Planning System Which Is Founded on Carefully Considered Legislative Judgments.

Tigard's exactions, like all of its land-use regulation, are founded in comprehensive planning. For nearly three quarters of this century, most states have authorized local governments to plan and regulate land use.[1] When properly implemented, planning tailors land-use regulation so

[1] The two model enabling acts created by the Harding and Coolidge administration that began land-use regulatory history failed to clarify the relationship between plans and regulations and defining this relationship was traditionally problematic for the courts, particularly where the plan was neither required nor binding. Sullivan and Kressel, *Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement*, 9 Urb. L. Ann. 33 (1975).

that it both protects private property interests and provides a comprehensive and balanced approach to servicing public needs. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Metromedia v. San Diego*, 453 U.S. 490, 531-33 (1981) (Brennan, J., concurring in judgment); *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 132 (1978). The planning process begins by gathering data on economic, demographic, cultural, physical, financial, and legal factors that shape land-use patterns. Planning builds on this empirical foundation to consider a diverse array of regulatory mechanisms, and to focus on the circumstances where they should be applied. It tailors public decision-making to address present conditions, while anticipating future needs. 1 Williams, *American Land Planning Law* § 1.11 (2d ed. 1988).

Administrative standards founded in planning constrain municipal discretion, permit land owners and developers to plan their own investment decisions based on predictable guidelines, and provide reviewing courts with "a measuring rod to gauge the validity of" a challenged exaction. *Longridge Builders, Inc. v. Planning Board of Princeton*, 245 A. 2d 336, 338 (N.J. 1968). By developing and implementing comprehensive planning programs, municipalities serve all of these interests. In sum, planning affords a basis for land-use regulation that is the antithesis of the type of singling out forbidden by the takings clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Recognizing these benefits from planning, many states – acting in their familiar role as policy makers – revamped their land-use systems during the last twenty-five years. Oregon remains a leader in this movement. Starting in 1969, the state legislature required (rather than merely authorized) local governments to plan and zone lands within their boundaries. 1969 Or. Laws 324. In 1973,

the Oregon legislature enacted Senate Bill 100 to further enhance the role of planning in land-use regulation. 1973 Or. Laws 80.

Most importantly, Senate Bill 100 required all local governments to adopt comprehensive plans, Or. Rev. Stat. §§ 197.010, 197.015(5) & 197.175(2)(a), and to implement those plans through zoning, subdivision, and other land-use regulations. *Id.*, §§ 197.175(2)(b) & 197.015(11). The legislation also authorized a new state agency, the Land Conservation and Development Commission (LCDC), to adopt and amend mandatory planning goals, *id.*, § 197.040(2)(a), and administrative rules, *id.*, § 197.040(1)(c), after an elaborate state-wide public hearing process. *Id.*, §§ 197.225-247. Oregon's system provides a high degree of predictability and fairness in land-use regulation by specifying minimum local procedures and requiring that land-use decisions be based upon plans.[2]

Cities and counties retain primary authority for planning and regulating land use consistent with the requirements of the state-wide goals. *Id.*, § 197.005(3). When holding hearings on permit applications, local government must follow detailed and specific procedural requirements. *Id.*, § 197.763. LCDC reviews local land-use plans and regulations for compliance with the goals through a formal process of "acknowledgment." *Id.*,

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[2] "The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation." Or. Rev. Stat. § 227.175(4).

§§ 197.251 & 197.015(1).[3] When the legislature adjusts the statutory framework of the land-use system,[4] local plans and regulations must be reviewed and in some cases revised to reflect the changed understanding of proper land-use policy.

In 1979, the legislature fashioned a new approach to reviewing challenges to land-use decisions made by local governments and state agencies. It gave a new entity, the Land Use Board of Appeals (LUBA), exclusive jurisdiction (subject to judicial review) over land-use appeals. *Id.*, §§ 197.805-855 & 197.015(10). Among other grounds, the alleged unconstitutionality of a permit decision can be the focus of a LUBA hearing. *Id.*, § 197.835(7)(a).

LUBA is required to decide cases quickly and efficiently.[5] *Id.*, § 197.805. To facilitate this speed and efficiency, parties must raise issues at the local government level in order to be heard by LUBA and the appellate

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[3] LCDC also has enforcement authority over local governments to ensure that planning and land-use actions are consistent with the goals. Or. Rev. Stat. §§ 197.319-335.

[4] For example, the legislature has required local governments to provide sufficient land zoned for all kinds of residential uses (Or. Rev. Stat. §§ 197.295-315), required manufactured housing to be a major factor in local plans (*Id.*, §§ 197.475-490), required housing for the disabled or those with special needs to be provided in local plans (*Id.*, §§ 197.660-670), required seasonal farm worker housing to be provided where needed (*Id.*, §§ 197.675-685), and has limited the power of state agencies, special districts or cities and counties to enact moratoria (*Id.*, §§ 197.505-540).

[5] The various time frames for land-use decision making and appeal, and LUBA and Court of Appeals consideration, mean that it is possible to have a matter before the state supreme court within a year of filing a permit application. Or. Rev. Stat. §§ 197.830(8), (19), 197.850(5), (7), 197.855(1).

courts. *Id.*, §§ 197.763(1), 197.830(10) & 197.835(2).[6] The regulations challenged by Petitioner arise out of this planning background.

B. The Challenged Regulatory Conditions Were Properly Tailored to the Likely Impacts of Petitioner's Proposed Development.

Tigard's plans are an integral part of its land-use regulatory program. These plans provide reasonably foreseeable requirements for proposed development. Significantly, the City's plans not only justify permit conditions, but could also justify outright denial of Petitioner's application.

Tigard has an "acknowedged" comprehensive plan and land-use regulations. This means, among other things, that its plans and regulations were adopted after full citizen participation (Goal 1), are internally consistent and coordinated with plans and programs of other governmental agencies (Goal 2), guard against pollution of stormwater (Goal 6), allow only appropriate land uses in areas prone to natural disasters and hazards (Goal 7), encourage economic development (Goal 9), accommodate public services and facilities (Goal 11), and provide for an effective and coordinated transportation system (Goal 12). For developers, having land-use regulations in accordance with a comprehensive plan means that implementation of the policies is predictable and that an opportunity to weigh exactions is available at the time a permit is requested.

As Respondent's brief makes clear, Tigard developed detailed transportation and storm drainage plans only

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[6] LUBA "shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record." Or. Rev. Stat. 197.830(13)(b).

after thorough empirical studies. It has also enacted the regulatory means to implement these plans when a property owner requests development permission. The conclusions embodied in Tigard's plans are applied to an individual development proposal according to the expected impacts that arise with each permit application. Tigard's Master Drainage Plan is based on an extensive study by the City's engineering consultants. Its Transportation Plan addresses the existing conditions and anticipated needs for both conventional and alternative transportation modes. Those plans calculate the city's infrastructure needs at full development in accordance with the land-use designations on the plan map.

When individual development permission is requested, as in this case, Tigard reviews the impacts specifically expected from the proposed development and imposes conditions in response to those impacts. In the "Action Area" overlay district, where Petitioner proposes her development, Tigard may require reasonably related exactions only from "major modifications" in use "where such conditions are necessary to:

> a. Carry out applicable provisions of the Tigard comprehensive plan;
> b. Carry out the applicable implementing ordinances; *and*
> c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made."

Tigard Community Development Code (CDC) §§ 18.120.070(B), 18.32.250(F)(1) (emphasis added). If a developer objects, its contentions of an insufficient relationship must be raised before Tigard's permitting agencies. Or. Rev. Stat. § 197.763(1). This procedural rule places little burden on the developer, since it merely builds upon independent application requirements to set

forth the traffic and drainage impacts of a proposed development. CDC §§ 18.164.030 & 18.164.100 & 18.84.000 *et seq.* Petitioner failed to fulfill even this standard request; moreover, she never disputed Tigard's attribution of impacts in its planning staff report and development approvals. Nor did Petitioner challenge the findings supporting Tigard's decision at LUBA or in the courts. Now, however, Petitioner asks this Court to do something that it has traditionally avoided – she asks that it second-guess a municipal regulatory decision – notwithstanding those uncontested findings.

If Petitioner had applied for a permit to construct a storage shed, no exactions would have been required, since the expected impacts would have been minimal. If she had sought to build a mini-market instead of an expanded plumbing store, Tigard's conditions may well have been different than those imposed here, since its specific impacts might have had a different relationship to the needs identified in its plans. Based on formulas set forth in its plans, Tigard calculated the increased run-off from proposed additional impermeable surfaces from the larger building and more paved parking. Tigard calculated the increased vehicular traffic attributable to the changed use based on similar data. Its findings detailed how these calculations applied to Petitioner's proposed expansion. Thus, Tigard addresses its infrastructure needs at the front end of the process (i.e., in the development of its facilities plans), and applies those plans at the permit stage (i.e., when a major change in use is requested). Safeguards exist for the property owner in the form of opportunities to challenge a condition during the permit adjudication based on the findings and evidentiary support underlying the condition.

In the absence of a well-considered planning process such as Tigard's, a city might "underzone" an area (i.e.,

by restricting the intensity of development below a level that sound planning might deem appropriate) and then negotiate exactions on an ad hoc basis whenever a rezoning is requested. Alternatively, a city might project into the future its suspicions about the most intense land use possible for a site and, when a first permit is sought, impose a "one size fits all" exaction as a condition of approval. Tigard has rejected both alternatives.

Instead, Tigard has elected to consider and regulate the impacts of development by mitigating specific impacts when they occur. A central purpose of planning is to address water, sewer, transportation, drainage and other infrastructure needs as nearly concurrently as possible with actual development. By adopting and implementing its transportation and drainage plans, Tigard has done precisely that.

Tigard's approach tailors conditions to meet identified impacts. If Petitioner believes the conditions lack a nexus to the impacts, the simple method of testing that premise is to challenge the adequacy of, and evidentiary support for, the City's findings. *See Cummins v. Washington County*, 22 Or. LUBA 129 (1991), *aff'd*, 823 P.2d 438 (Or. App. 1992) (citing *Norvell v. Portland Area LGBC*, 604 P.2d 896 (Or. App. 1979)). Petitioner did not follow this procedure by presenting her own calculations, or other evidence, for the City, LUBA, and the courts to consider, or by challenging Tigard's methodology. Rather, she seeks to invoke abstract questions inviting judges to use their own decisional predilections. This case should be resolved by focusing on its facts, i.e., by discussing the actual relationship between her impacts and Tigard's conditions.

The citizenry's needs, and Tigard's efforts to address these needs as they are implicated by individual development applications, are reflected through the City's

comprehensive and public facilities plans, not the ipse dixit Petitioner perceives. Petitioner could have challenged the basis for Tigard's exactions, their proportionality as a cost of development, or the sufficiency of evidence underlying Tigard's order, but she did not do so.

C. Petitioner Failed to Challenge the Findings Supporting Tigard's Conditions on Her Development.

Tigard imposed several conditions when approving Petitioner's permit request, based on carefully drawn and unchallenged findings regarding the impacts of her proposed development. Petitioner's challenge lacks references to the facts of the case, or the plans, policies and regulations which provide its context. Instead, it makes a broad, abstract attack on local authority to impose conditions of approval on permits.

In fact, Petitioner conceded both the sufficiency of a public purpose and the presence of a nexus between that purpose and the imposed exaction in her arguments before LUBA:

> Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation.

Dolan v. Tigard, 22 Or. LUBA 617, 621 (1992) (emphasis supplied). Thus, Petitioner's arguments before LUBA conceded that this case was unlike the situation in *Nollan* where no nexus existed. Petitioner's current claims of an insufficient relationship fail to challenge either the adequacy of the findings or the sufficiency of the evidence underlying Tigard's order.

Finally, Petitioner has not argued that, if the reasonable relationship test were applied, then the City's decision would not pass muster. Rather, she argued that a "substantial advancing" test must be met. This Court should confirm that the "reasonable relationship" test is the proper analysis, and that Tigard's exactions pass that test.

II. RATIONALITY REVIEW IS PROPERLY A DUE PROCESS ANALYSIS; EVEN IF INCORPORATED INTO THE TAKINGS INQUIRY, IT SHOULD ADHERE TO THE REASONABLENESS STANDARD BY WHICH COURTS EXPRESS THE TRADITIONAL RESPECT EXISTING BETWEEN BRANCHES OF GOVERNMENT.

Petitioner's claim presents an inappropriate approach to takings analysis in several respects. First, this Court's traditional takings analysis has not encompassed rationality review at all; instead, the due process clause has long been looked to as the proper source for such analysis. Second, regardless of its constitutional foundation, judicial review of the rationality of economic regulation, including land-use regulation, has long given due deference to the judgment of other governmental bodies.

This Court should reject the Lochnerian approach suggested by the *Nollan* dicta by reaffirming its long pattern of decisions in land-use and other economic regulation cases.

A. Judicial Measurements of the Rationality of Legislative Action Arise from the Due Process Clause; They Are Not Proper Subjects for Takings Analysis.

It has long been clear that a challenge to the rationality of legislative and administrative action comes under the due process clause. *Lawton v. Steele*, 152 U.S. 133 (1894). This Court has historically heard land-use cases, for example, as substantive due process claims. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *Nectow v. Cambridge*, 277 U.S. 183, 185 (1928); *Gorieb v. Fox*, 274 U.S. 603, 605 (1927); *Zahn v. Board of Public Works*, 274 U.S. 325, 327 (1927).

The takings clause undertakes a similar inquiry only by borrowing from the substantive due process analysis. *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment) (suggesting that *Euclid* "fused" the two inquiries). When proffering the "substantially advanc[ing]" test of rationality, *Nollan* cites *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), briefly summarizing two lines of land-use precedent. *Nollan*, 483 U.S. at 834 n.3. *Agins* in turn directly references *Nectow*, 277 U.S. at 188, a substantive due process case. *Agins*, 447 U.S. at 260. And *Nectow* relies upon *Euclid*, 272 U.S. at 395, yet another

substantive due process case. *Nectow*, 277 U.S. at 188. Thus, the very citation from *Nollan* suggesting a distinct takings inquiry reveals that the takings clause does not offer an independent source of authority for such an analysis.[7]

The purposes of the due process and takings clauses reinforce this conclusion. As a threshold inquiry, substantive due process analysis establishes the outer "limits beyond which the legislature cannot rightfully go." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). To determine if governmental action extends beyond constitutionally permissible boundaries, this analysis typically balances public and private interests. *See, e.g., Euclid*, 272 U.S. at 386-87. In this context, if the validity of land-use regulation "be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. This "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies" has endured for the better part of this century. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).[8]

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[7] The different remedies afforded to due process and takings violations reinforce the importance of properly separating the two inquiries. While due process violations – improper exercises of the police power – are invalidated, unconstitutional takings are remedied by payment of "just compensation." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Given the separate purposes of the two clauses, as outlined below, the remedy for one may not address the needs of the other. *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting).

[8] This Court has "ma[d]e it plain that [it] does not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). *See Heller v. Doe*, 113 S.Ct. 2637, 2642-73 (1993); *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101-03 (1993); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981).

The takings clause serves a narrower, more specific purpose in protecting private property. It "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper* interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis added). In contrast to the due process balancing of public and private interests, takings analysis measures a regulation's impact upon private property against the pre-existing private interest. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court has recognized two primary circumstances in which a regulatory taking may be found. Both "a permanent physical occupation authorized by government" and a "regulation that deprives land of all economically beneficial use" have the practical effect of destroying any interest that a property held, analogous to the forced conversion exercised by power of eminent domain. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

The *Nollan* opinion acknowledged that rationality review implicates no traditional takings clause concerns. *Nollan*, 483 U.S. at 835 n.4. Indeed, by suggesting that failure to substantially advance a legitimate purpose could singlehandedly result in a taking, *Nollan* deviates sharply from this Court's takings decisions under which the governmental interest is one of many factors in an ad hoc balancing process. *Penn Central*, 438 U.S. 104; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Despite the absence of jurisprudential or precedential support, *Nollan* suggested that the rationality test

could determine a taking. *Nollan*, 483 U.S. at 842.[9] This Court should make it clear that takings claims such as Petitioner's do not encompass rationality review.

B. Both Due Process and Takings Cases, Including *Nollan's* Holding, Demonstrate this Court's Respect for Legislative Judgments.

None of this Court's land-use decisions before *Nollan* suggested that the "substantially advancing" language should validate a heightened standard of review. Even *Nollan* itself actually applied the "reasonable relationship" standard, and not a stronger test. *Nollan*, 483 U.S. at 838. Notwithstanding some dicta buried in *Nollan's* footnote three, this Court's land-use decisions make clear that a properly circumscribed judicial role dictates the well-established "fairly debatable" approach to legislative judgments. *Euclid*, 272 U.S. at 388. For example, the Court upheld an ordinance creating an exclusive residential zone in a rapidly urbanizing area, refusing to "substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn*, 274 U.S. at 328. The Court upheld building setback requirements shortly thereafter, noting that increasing urban population density had provoked new regulatory responses:

> State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation

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[9] Regulations intruding upon the right to exclusive occupation do not always constitute takings, as where the owner's use of its property regularly invites public use. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980).

> which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Gorieb, 274 U.S. at 608. Taken together, these cases reveal that the "substantially advancing" standard has been applied with due deference to the judgments of land-use regulators.[10] It has not been used to intensify judicial scrutiny of land-use regulations.

More recently, this Court has invoked the "reasonable relationship" standard to emphasize its respect for legislative judgments regarding land use. For example, the "familiar standard of 'reasonableness' " was the centerpiece of *Goldblatt's* holding. *Goldblatt*, 369 U.S. at 594-95. In *Penn Central*, this Court's ad hoc balancing of interests was consistent with a deferential threshold inquiry of reasonableness, not with a substantial advancement requirement. *Penn Central*, 438 U.S. at 123. Justice Stevens' swing vote in *Moore* focused on "the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*." *Moore v. East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J., concurring in judgment). Finally, in *Schad* and *Arlington Heights*, this Court held up the reasonable relationship standard to highlight the extraordinary circumstances of those cases where a more demanding standard became necessary when fundamental free speech rights were implicated or a suspect racial classification was employed. *Schad v. Borough of Ephraim*, 452 U.S. 61, 68 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977). Moreover, on the occasions when this Court has

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[10] Of course, if the record created below expressly found that a zone classification failed to serve any police power goals, it might be invalidated, at least when it also precluded any "practical use" of the land. *Nectow*, 277 U.S. at 187-88.

invoked the "substantially advancing" language, it has also made clear the continued importance of the presumption of validity and accompanying judicial deference. See, e.g., *Keystone*, 480 U.S. at 493.

Consistent with this court's earlier holdings, the *Nollan* decision ultimately rested upon the familiar reasonable relationship standard, thus rejecting the dicta in its own footnote three and in a handful of recent cases. Thus, its holding is consistent with this Court's long-standing respect for other branches of government and with state courts' approaches to reviewing exactions. The Court concluded that the lateral beach access exacted by the California Coastal Commission did "not meet even the most untailored standards" of judicial review. *Nollan*, 483 U.S. at 838. It did so after "accept[ing], for purposes of discussion," and applying the reasonable relationship standard and justifying its approach as consistent with that of all state courts, save California. *Id.*

The Court's analysis began by noting that "a broad range of governmental purposes," including scenic zoning, landmark preservation and residential zoning, constitute legitimate state interests. *Id.* at 834-35 (citing *Agins*, 447 U.S. 255; *Penn Central*, 438 U.S. 104; *Euclid*, 272 U.S. 365). The Court then "assume[d], without deciding" that the three purposes asserted by the Coastal Commission also satisfied this test. As described by the Court, "among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835.

The Court then turned to the second portion of the inquiry; "how close a 'fit' between the condition and the burden is required." *Id.* at 838. The Court concluded that it was "quite impossible to understand" how the means

used by the Commission served the ends asserted in any way at all. *Id.* at 838. In so doing, the Court followed and applied the reasonable relationship test. *See, also, Concrete Pipe Products of California v. Construction Laborers Pension Tr.*, 113 S.Ct. 2264, 2289 (1990).

Nollan also identified a large number of state and lower federal court decisions that were "consistent with [its] approach." *Id.* at 839. Significantly, the vast majority of these decisions are reasonable relationship cases. *See, Parks v. Watson*, 716 F.2d 646, 652 (9th Cir. 1983); *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 673-74 (Colo. 1981); *MacKall v. White*, 445 N.Y.S.2d 486, 487 (App. Div. 1981); *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980); *Briar West, Inc. v. Lincoln*, 291 N.W.2d 730 (Neb. 1980); *Call v. West Jordan*, 614 P.2d 1257, 1258 (Utah 1980); *Collis v. Bloomington*, 246 N.W.2d 19, 23 (Minn. 1976); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363, 367 (Mo. 1972); *Schwing v. Baton Rouge*, 249 So.2d 304, 308 (La. App.), application denied, 252 So.2d 667 (La. 1971); *Longridge Builders*, 245 A.2d at 337; *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 676 (N.Y. 1966); *Jordan v. Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965); *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182, 186 (Mont. 1964).[11]

The *Nollan* opinion juxtaposed these reasonable relationship cases against California's doctrine, which had "firmly established that the justification for required dedication is not limited to the needs of or burdens created by the project." *Remmenga v. California Coastal Commission*, 209 Cal. Rptr. 628, 631 (1985) (cited in *Nollan*, 223

[11] An alternative analysis strenuously criticizes *Nollan*'s string citation as failing to understand the various state tests. 1 Williams, *American Land Planning Law*, § 5A.20 n.81 (2d ed. 1988). The Illinois standard, in particular, contrasts sharply with that found in virtually every other state. *Id.* § 6.16.

Cal.Rptr. 28, 30 (Cal. Ct. App. 1986), *rev'd*, 483 U.S. 825)). By contrasting these two lines of precedent (mainstream reasonable relationship doctrine, and California's aberrational approach), *Nollan* underscored the Court's explicit acceptance and application of the widespread reasonable relationship standard. *Id.*

Framed in broader terms, these cases illustrate that the normal presumption of validity and accompanying deferential respect for decisions made by the legislature have long been recognized as central features in American law derived from the characteristics of the various branches of government. The Court has emphasized this point repeatedly: "[a]s underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251, 258 (1931); *Carolene Products Co.*, 304 U.S. at 783, *Keystone*, 480 U.S. at 493.[12]

Appellate courts have acknowledged time and again that it is not their function to try cases anew, or debate the wisdom of legislative action. The virtues of this approach are heavily reinforced by the importance of protecting judicial dockets from being overwhelmed with cases where resourceful parties routinely challenge well-considered and necessary governmental regulation. The courts have consequently limited their role to assessing the reasonableness of governmental action, when questions about such reasonableness have been properly raised and preserved for review. This Court has rejected

[12] This Court should resist requests to gut the police power by resurrecting antiquated doctrines as a "second best" alternative to direct assault. Epstein, *The Supreme Court, 1987 Term – Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5, 28 (1988).

efforts to "federalize" zoning disputes and other property claims. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Parratt v. Taylor*, 451 U.S. 527 (1981). Similarly, it should reject Petitioner's efforts to turn this and other federal courts into super-planning commissions, where developers might consistently seek a "better deal" than that which they received from the governmental bodies properly charged with the duty of administering land-use regulation.

Thus, in this case, Tigard's decision to use exactions based on carefully formulated plans should be respected by courts reviewing its land-use regulatory system. Particularly since those plans and regulations grew out of a system enacted by the Oregon legislature after careful consideration, this Court should give deference to the legislature's determination that these are the appropriate means for addressing a series of legitimate governmental concerns.

III. LOCAL GOVERNMENTS EMPLOY REGULATORY CONDITIONS AFTER ASSESSING A DEVELOPMENT'S LIKELY IMPACTS ON THE BASIS OF SOUND PLANNING PROJECTIONS; COURTS DEFER TO THESE ADMINISTRATIVE FINDINGS.

Local governments typically administer their exactions programs so that regulatory conditions are tailored to respond to actual development impacts. The findings that support such tailoring traditionally and appropriately form the basis for judicial review of specific exactions. These regulatory programs are common; indeed, during this Court's long absence from the land-use field, the state courts fashioned standards for determining the constitutionality of local government ordinances authorizing a wide variety of development

exactions.[13] Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: a Brief History of Land Development Exactions*, 50 L. & Contemp. Probs. 5, 6, 11-14 (1987). Contemporary exactions practice routinely relies on reasonable planning projections to assess the expected development impact upon which it will be based. Careful analysis of state court exactions cases demonstrates that these courts, in line with this Court's deferential approach to local administrative action, have traditionally respected administrative findings of expected impact.

A. Contemporary Exactions Programs Rely Upon Planning Projections to Anticipate a Development's Likely Impacts and Determine the Proper Regulatory Response.

Municipalities across the country administer exactions programs of various types, including on-site dedications, off-site improvement requirements, and impact fees. Bauman & Ethier, *Development Exactions and impact Fees: A Survey of American Practices*, 50 L. & Contemp. Probs. 51, 56 (1987). These exactions are applied to all

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[13] Despite different labels, there is a consensus on the appropriate test, building on a leading Wisconsin case, *Jordan*, 137 N.W.2d at 448, which sticks closely to the reasonableness standard. *See, e.g., Parks*, 716 F.2d at 653; *Call*, 614 P.2d at 1258; *Collis*, 246 N.W.2d at 23; *Jenad*, 218 N.E.2d at 676 (all cited in *Nollan*).

Two aberrational approaches also exist: Illinois' strict test, *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799 (Ill. 1961) (need for exaction must be "specifically and uniquely attributable to" development's impact); and the lenient California doctrine rejected by *Nollan*. *Associated Home Builders v. Walnut Creek*, 484 P.2d 606 (Cal. 1971) (justifying exaction purely "on the basis of general public need," irrespective of development's impact).

manner of development activity, from residential subdivisions to commercial and industrial facilities. *Id.* The common element among exactions programs is that they are fashioned as part of a broader planning process, and applied with attention to the expected impacts of a particular development. Siemon, *Who Bears the Cost?*, 50 L. & Contemp. Probs. 115, 116-18 (1987).[14]

The Constitution has never required absolute precision from land-use planning and regulation. This Court's opinions "do not suggest that courts 'have a license to judge the effectiveness of legislation' . . . or that courts are to undertake 'least restrictive alternative' analysis. . . . That a land-use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for

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[14] The Oregon Supreme Court recently considered this issue in a different context. *Oregon Department of Transportation v. Lundberg*, 825 P.2d 641 (Or.), *cert. denied* 113 S.Ct. 467 (1992). Lundberg owned a vacant lot on a commercial highway, along which the City's plan required a specific right-of-way if commercial development was proposed prompting a need for the dedication. Before Lundberg's parcel was developed, however, the State condemned the right-of-way to construct highway improvements. The Oregon Supreme Court upheld a jury instruction that there were nominal damages in such situations, because a "reasonable relationship" existed between anticipated commercial development and the right-of-way. *Id.*, at 646-47. Where, as here, the anticipated commercial development has actually been proposed, not even nominal damages would be warranted.

There are good reasons for agreeing with *Lundberg's* proposition that a city's plan can establish the reasonable relationship. Cities do not fill every administrative record with the technical papers and research used in compiling a comprehensive plan. An applicant for local approval may challenge this data when seeking development permission, either by disputing the City's findings and conclusions or by critiquing their evidentiary support. In this case, Petitioner did neither.

rejecting it." *Keystone*, 480 U.S. at 487 n.16. In *Euclid*, for example, the Court recognized "that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished in terms of legislation." *Euclid*, 272 U.S. at 389. Requiring undue precision for every individual exaction would ignore the constitutional principle that a modicum of flexibility is "necessary to deal realistically with questions not susceptible of exact measurement." *Banberry Development Corp. v. South Jordan City* 631 P.2d 899, 904 (Utah 1981) (citation omitted); *see also Contractors & Builders Ass'n v. Dunedin*, 329 So. 2d 314, 320 n.10 (Fla. 1976) ("perfection is not the standard of municipal duty").[15]

Even if exact measurement were possible, holding the yardstick up to every impacted property interest would be a cumbersome, timely and costly process. *Jordan*, 137 N.W.2d at 447. If this Court demands a "property rights impact statement" for every individual exaction, it is property owners who would doubtless suffer through protracted administrative review seeking the perfect fit between exaction and objective.

Moreover, demanding undue certainty in land-use planning would stymie government's ability to regulate land use. This Court has recognized that "[g]overment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413. As one of the leading exactions cases pointed out:

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[15] Even the aberrationally strict Illinois standard allows "averages to predetermine" a development's expected impact. *Northern Illinois Home Builders Ass'n v. Du Page County*, 621 N.E.2d 1012, 1021 (Ill. App. Ct. 1993).

> In most instances it would be impossible . . . to prove that [a dedication requirement] was to meet a need solely attributable to the anticipated influx of people . . . [who will] occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.

Jordan, 137 N.W.2d at 447.

Finally, as is the case here, planning also provides "some demonstrable benefit" to the very property subject to an exaction. *Call*, 606 P.2d at 1259. Planning can create a regulatory framework benefiting property's ultimate users, as by guarding the "welfare of families" who will occupy a residential subdivision. *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 867 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977) At other times, the advantage flows directly to developers, as a necessary by-product of municipal planning. *See, e.g., Aunt Hack Ridge Estates, Inc. v. Danbury*, 273 A.2d 880, 885 (Conn. 1970) (park dedication increased market value for subdivision lots); *Ayres v. City Council*, 207 P.2d 1, ___ (Cal. 1949) (lot layout minimized land loss and decreased street improvement costs). Yet other times, as in this case, the developer and the ultimate user are the same entity. Here, the benefits include protection from increased flooding on Petitioner's property and facilitation of consumer access to her expanded business.

B. Administrative Findings on Expected Development Impact and the Proper Regulatory Conditions Receive Due Deference from Reviewing Courts.

If a developer believes that an exaction is unreasonable (under any of the different state standards), it bears the burden of proving that the data upon which the exaction is founded is unreasonable. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). This requirement is familiar throughout administrative law:

> Since the information that must be used to assure that [the exaction is] within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its [exaction]. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers.

Banberry, 631 P.2d at 904; *see also College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984) (" ' extraordinary burden' rests on one attacking") (cited in *Nollan*); *Home Builders Ass'n v. Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977).

As *Nollan* made clear, a land-use agency that fails to meet its initial burden of coming forward with evidence will no longer enjoy the ordinarily favorable assumptions about the factual basis for its decision. *See, e.g., Metromedia*, 453 U.S. at 509 (plurality opinion); *Penn Central*, 438 U.S. at 132; *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949). Because the Coastal Commission's justifications were fashioned after the Nollans' initial judicial challenge, the Court apparently believed that these were "made-up purpose[s] of the regulation."

Nollan, 483 at 828, 839 n.6. This peculiar posture – administrative findings ascribed only after a judicial challenge – suggested that the Commission's "purpose [was] avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841.[16] This suspicion of administrative findings is appropriate only for post hoc rationalizations for a decision already made, as occurred in *Nollan*. When examining Petitioner's claims, which leave Tigard's conventional, pre-decisioned findings unchallenged, this Court should recognize that the distrust of the Coastal Commission in *Nollan* reflected that case's peculiar posture, and should not be ingrained into takings jurisprudence to create a standard of review that would damage the legal foundation of land-use planning and regulation nationwide.

CONCLUSION

Tigard's exactions arise out of a well-considered planning program and have been tailored to mitigate the specific impacts expected from Petitioner's development. Petitioner challenges none of that. Rather, she asks this Court to adopt a test that its cases have long rejected, simply so that she can have a second chance. Lest the courts of this country become embroiled in second-guessing the technical decisions of planning commissions,

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[16] *Nollan* also suggested a safe-harbor for governmental regulations - a per se non-taking. When a permit condition is justified by the same purpose that would have supported outright denial, then the regulation "should not be found to be a taking." *Nollan*, 483 U.S. at 836.

amici respectfully request that this Court affirm the judgment of the Oregon Supreme Court.

Respectfully Submitted,

EDWARD J. SULLIVAN
PRESTON, THORGRIMSON,
SHIDLER, GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone (503) 228-3200

H. BISSELL CAREY, III
Counsel of Record
DWIGHT H. MERRIAM
R. JEFFREY LYMAN
ROBINSON & COLE
One Commercial Plaza
280 Trumbull Street
Hartford, Connecticut
06103
Telephone (203) 275-8200

Attorneys for Amici Curiae

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